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THE CONCEPTION OF DUTY IN PERSONAL INJURY CASES IN NEW YORK

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The first governing factor in determining whether a right of action exists in favor of a person injured against a particular other person is whether the latter owed any duty to the former. By "duty" is meant a legal requirement that the person sought to be held liable should have done something or refrained from doing something which action or forbearance would have prevented the particular mishap to the individual in question. If there is such a requirement in the law obligating the defendant to the plaintiff the former "owes a duty" to the latter. If no such duty is owed to the injured person he cannot recover. The simplicity of the foregoing is in many instances as nothing to the complexity of determining whether a duty is owed.

Early in the development of the law of the State of New York a rule was pronounced the application of which went very far to allay the numerous questions which may arise on this troublesome and fundamental point: A duty arises only where the defendant is required to act or refrain in regard to the subject matter either by statute or by contract with the plaintiff.[1] While hardly the cutter of every Gordian knot this precept went far towards unravelling many of the questions which could entangle the bar. Its difficulty can be traced to the fact that it failed to continue to reflect the social thought of the community. The diligent will no doubt unearth the fact that the venerable case referred to has never been overruled nor has the austere simplicity of its ruling ever been questioned and this despite numerous references in subsequent decisions. Perhaps admiration for a tenet of law which resolves instead of creating doubts has induced the highest court to decide otherwise without reference to its aged citation. Whatever the cause the rule stated no longer limits the instances in which a duty is owed.[2]

Accidents happen in many ways. Classification cannot be complete but an effort to arrive at the rules of law governing the existence of duty can be assisted by considering certain groups of cases where the facts have some common denominator. Certain problems are met with greater frequency in certain kinds of cases. The question of

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[1]The Mayor of Albany vs. Cunliffe, 2 N. Y. 165 (1849).

[2]Augustine vs. Town of Brant, 249 N. Y. 198, 163 N. E. 732 (1928) is a perfect illustration of a *contra* case to The Mayor, etc. vs. Cunliffe (*supra*) yet it quotes the early case with apparent approval.

duty arises often in the action brought by the employee of a subcontractor for injuries received from some defect in the building against the owner of the premises or a main contractor. Two facts always appear in such cases and present the kernel of the question. They are, first, the plaintiff is rightfully on the premises; second, the defendant has no contractual relation with the plaintiff. These facts at once present the question—Can there be a duty to a person rightfully and even expectedly exposed to the defendant's negligence to whom the defendant is under no statutory or contractual duty? The answer given by the decisions is that these facts alone present no liability. The duty in such circumstances is solely to provide a safe place to work. This is the duty owed to the defendant's own employees.[3] Stripped of other facts the situation presents no duty to the employees of others.[4] Where however the general contractor undertakes to supply a particular structure (as a scaffold) for the employees of a subcontractor he is under a duty to use reasonable care in the selection of materials and the like and the builder of such structure (as distinct from the owner or general contractor), where the nature of it implies that negligence in construction would be imminently dangerous to persons using it, is under a duty to use due care in its construction.[5] Of course if the owner himself puts up the structure his responsibility is that of the builder.[6] The duty resulting is not contractual in its origin nor does it come into being as an extension of the contract relationship. Its existence is predicated solely on the anticipation of imminent danger from a defective construction.[7] The same rules apply to the negligent repair of a structure as to its construction.[8] There are situations where a duty has been founded on an extension of the contractual relationship. For instance where the defendant adopts a course of conduct which he has reason to believe will be relied on by those coming on the premises and which if changed would be dangerous to them, there is a duty owed those people not to deviate from that course.[9] In other words the relationship is extended from those contracting with the defendant to include

[3]Heilback vs. Consumers Brewery, 207 N. Y. 133, 100 N. E. 599 (1912).

[4]Thaney vs. A. Frederick & Sons Co., 44 Misc. 134, 89 N. Y. Supp. 787 (Sup. Ct. 1904).

[5]Devlin vs. Smith, 89 N. Y., 470, 11 Abb. N. C. 322 (1882).

[6]Cook vs. The President, etc., of the New York Floating Dry Dock Co., 1 Hilton 436 (N. Y. 1857).

[7]Swan vs. Jackson, 155 Hun 194, 7 N. Y. Supp. 821 (1889).

[8]Kahner vs. Otis Elevator Co., 96 App. Div. 169, 89 N. Y. Supp. 185 (1st Dept. 1904).

[9]O'Leary vs. Erie Railroad Co., 169 N. Y. 289, 62 N. E. 346 (1901), reversing 51 App. Div. 25, 64 N. Y. Supp. 511 (4th Dept. 1900).

those with whom he is necessarily in contact and the duty he owes them is not to perform his contract to provide a safe place to work but to maintain, once he has established it, the same course of action provided an element of danger would attend discontinuance or change in that course.

A second group of cases presenting troublesome points on this question deals with the injuries received from a latent defect in an article purchased by the plaintiff from a third party. The general rule may be safely stated to be that if the article sold is not a dangerous instrumentality in itself there is no liability on the part of the manufacturer even though he conceals the defect.[10] In other words a manufacturer of articles not dangerous in themselves owes no duty to those with whom he has not contracted. Where however it is apparent that a defect in construction would make the article imminently dangerous to a large number of people besides the purchaser the article becomes dangerous in itself and attached to its manufacture is a duty to use care extending to all who may come in contact with it.[11] It is extremely difficult to define what brings an article into the classification "imminently dangerous." Conceivably faulty manufacture may turn the most harmless contrivance into a concealed pitfall. A rule of reason has been adopted limiting the inclusion to those things which experience has shown are prone to danger and excluding the article whose use anticipates no likelihood of injury—and this regardless of the fact that the instant case may show the innocent article to have caused severe injury.[12]

Two classes of cases are frequently confused with the "dangerous article" actions above discussed. One is the liability of the owner of personalty for defects in his property causing injury. Briefly the rule is that the duty is limited to those articles which are dangerous in themselves and where the defect arose while the article was in the possession of the owner.[13] The other class of case is that of a remote purchaser against a canner or bottler of foodstuffs for alien substances in the container. There the duty is to use due care not to allow the alien substance to be inserted.[14]

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[10]Kuelling vs. Roderick Lean Mfg. Co., 88 App. Div. 309, 84 N. Y. Supp. 622 (4th Dept. 1903), new trial denied 94 App. Div. 613, 88 N. Y. Supp. 1105 (4th Dept. 1904).

[11]Statler vs. Ray Manufacturing Co., 125 App. Div. 69, 109 N. Y. Supp. 172 (4th Dept. 1908).

[12]Jaronic vs. Hasselbarth, Inc., 223 App. Div. 182, 228 N. Y. Supp. 302 (3rd Dept. 1928).

[13]Finan vs. Valvaline Oil Co., 51 Misc. 292, 100 N. Y. Supp. 1087 (Sup. Ct. 1906).

[14]Cook vs. People's Milk Co., 90 Misc. 34, 152 N. Y. Supp. 465 (Sup. Ct. 1915).

A very interesting class of injury cases are those usually designated as in "nuisance." They are, for the most part, actions against owners of real estate for injuries befalling passers-by due to a defect in the land, building, or the appurtenances of either. Any such defect which is inimical to the safety of those coming in contact with it is styled a "nuisance." The recognition that such a cause of action existed is as old as any theory of obligation known to our law. Yet its principles, categorically denied in the early negligence cases, are as liberal as the most advanced conception of duty. The duty is owed by the obligated occupier of the land to all persons rightfully in or near the premises. It is to build the premises in such a manner that no threat of imminent danger to those persons lies.[15] There are also duties in regard to maintenance—first, not to allow a dangerous condition to continue in a building which one has purchased;[16] second, not to allow a nuisance to arise through neglect of the premises.[17] A breach of the latter duty, it should be noted, is not chargeable to an owner who has leased the premises for any dereliction occurring while he is out of possession without his knowledge,[18] providing, of course, that the lease does not put on him the duty of making repairs.[19]. Where the lease contains such a provision the landowner's duty to third persons is not thereby increased but to avoid a circuity of actions suit against him is permitted. The duties rest on no statutory or contractual foundation except in those cases where the defect is due to construction which violates a statute.[20] In order to determine the basis for the extraordinary duty placed on the owner or occupier of realty it is important to know just what it is. Where the nuisance arises from a dangerous construction the owner at the time of the construction, any intermediate owner who suffered the condition to continue unabated and who transferred ownership voluntarily for profit, and the owner at the time of the accident, are alike subject to the consequences of the duty.[21] By "profit" is meant a benefit derived in the transfer because of the existence of the nuisance.[22] In total they present an incident consequent on the privileges of land ownership and dominion, an obligation to the public which subject to certain rules of reason accrues with the dominion in the realty.

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[15]Walsh vs. Mead, 8 Hun 387 (1876).
[16]McGrath vs. Walker, 64 Hun 179, 18 N. Y. Supp. 915 (1892).
[17]Morris vs. Barrisford, 9 Misc. 14, 29 N. Y. Supp. 17 (1894).
[18]Uggla vs. Brokaw, 117 App. Div. 586, 102 N. Y. Supp. 857 (1st Dept. 1907).
[19]Ahearn vs. Steele, et al, 115 N. Y. 203, 22 N. E. 193 (1889).
[20]Congreve vs. Morgan, 4 Duerr 439 (1855).
[21]Wilkes vs. N. Y. Telephone Co., 243 N. Y. 351, 153 N. E. 444 (1926).
[22]Slavits vs. Morris Park Estates, 98 Misc. 314, 162 N. Y. Supp. 888 (Sup. Ct. 1917).

Liability under this last discussed theory has been sought to be imposed upon landowners for conditions on the public sidewalk adjacent to their premises. Particularly where snow or ice from rainwater has accumulated on the walk after falling from the defendant's building persons injured by this condition have brought suit. The primary liability in such cases being on the city, as hereinafter discussed, liability could only attach where the construction of the abutting building contributed to the accumulation. The courts have recognized the natural property of the elements to flow off buildings onto the sidewalk and have held that where there is nothing unusual in the construction of the building to aggravate this natural property there is no liability.[23] Devices designed to direct the flow of rain, such as drainpipes, if constructed with care and not in violation of law impose no liability even if the discharge from them coagulates on the walk.[24] There is no duty on the householder in regard to the condition of the public highway. On the contrary he is entitled to build lawful structures, such as fences, to keep snow from drifting on his property even though it is reasonably foreseeable that the structure would cause dangerous drifts to accumulate on the highway.[25] An extraordinary or wrongful construction, however, inducing a discharge on the highway would be different as such a construction constitutes a threat of danger beyond that to be expected from the natural accumulation of snow or formation of ice and would therefore be a nuisance.[26] In such a case the landowner becomes a joint tort feasor with the municipality, the latter in permitting the continuance of the condition being negligent in its duty regarding highways.[27] An interesting situation, legally, arises where the construction would import no imminent danger if snow were promptly removed. These facts present a nice question—whether the liability is in nuisance or negligence. Injury can only result from the construction (nuisance) plus the failure to remove (negligence). The solution to the problem as far as concerns questions of pleading and proof is that either theory suffices on proof of the facts.[28] It is likely, however, that a nuisance action could not be supported against an owner out of possession or a former transferor of the property. The

[23]Moore vs. Gadsden, 87 N. Y. 84 (1881).

[24]Wenzlick vs. McCotter, 87 N. Y. 122 (1881).

[25]Cooney vs. Northern Central Railway Co., 180 App. Div. 675, 167 N. Y. Supp. 865 (4th Dept. 1917).

[26]Kleinmier vs. State of New York, 10 State Dept. Repts. 113 (1916).

[27]Klepper vs. Seymour House Corp. 246 N. Y. 85, 158 N. E. 29 (1927).

[28]Venable vs. Consolidated Dry Goods Co., 225 App. Div. 202, 232 N. Y. Supp. 404 (2nd Dept. 1929).

net effect of such a legal situation is of real significance and of itself is no mean indication of our present concept of duty.

Apparently similar to the duty owed by the owner of realty is the obligation of a municipal corporation in regard to its streets. It is responsible to those rightfully using them for any injuries caused by encumbrances allowed to remain there.[29] This duty depends on control. The duty in regard to defects in construction or maintenance is quite different. This is an obligation to the public arising from the municipality's statutory duties concerning its streets.[30] It depends strictly on the statutory obligation to build or maintain the highway—so that when the municipality is excused from such obligation, as where a different agency is created for that purpose there is no duty on its part.[31] Conversely the responsibility of the city is absolute and where the defect exists liability therefor attaches even though the fault is that of another.[32] However, it should be noted that though the origin of the duty is the statutory obligation above noted and this controls the instances in which a duty arises, the nature of the duty, once it is seen to exist, is not statutory. If it were the duty would be owed only to those using the highway for travel. The law is that the highway must be sufficient for all incidental uses to which it might be reasonably put by persons passing along it.[33] No reason for this odd situation has been discovered. The results reached are beneficial, which is an answer if not an explanation for a logical inconsistency.

The liability extends solely to those thoroughfares which the municipality is required by law to maintain.[34] And it is subject to such statutory conditions, such as notice, as the legislature may fix.[35] Liability, however, will attach even though all the formal steps necessary to acquisition are not strictly complied with[36] and has been imposed in regard to highways which have been acquired through no more formal means than acknowledgment of long use by the municipality.[37] The test of liability is whether the use by the

[29]Sewell vs. City of Cohoes, 75 N. Y. 45 (1878).

[30]Hutson vs. City of New York, 5 Sandf. 289 (1851).

[31]Hickok vs. Trustees of Plattsburgh, 15 Barb. 427 (1853).

[32]Wendell vs. Mayor of Troy, 39 Barb. 329 (1862).

[33]Langlois vs. City of Cohoes, 58 Hun 226 (1890).

[34]Ehle vs. Town of Minden, 70 App. Div. 275, 74 N. Y. Supp. 903 (3rd Dept. 1902).

[35]Sprague vs. City of Rochester, 52 App. Div. 53, 64 N. Y. Supp. 846 (4th Dept. 1900).

[36]Seymour vs. Vil. of Salamanca, 137 N. Y. 364, 33 N. E. 304 (1893).

[37]Ivory vs. Town of Deerpark, 116 N. Y. 476, 22 N. E. 1080 (1889).

public has been acquiesced in by the city.[38] If responsibility attaches through dedication and acceptance the liability is to maintain a regular street with proper grades, entrances and the like even though this would entail changes in the streets already maintained.[39] And liability attaches for any portions of such streets which were privately constructed prior to acceptance.[40]

There is no public liability involved in the routing or planning of a street. But the duty to maintain is not met by a construction which is incomplete even though that construction accords with the plans for it.[41] Where the public necessity demands streets may be torn up and consequently rendered unsafe for traffic. In such instances the duty to those using the streets obligates the city to erect warnings and safeguards about the torn up area[42] and to maintain them of sufficient strength that the travelling public may be protected from the consequent danger.[43] Or the entire street may be closed and if this is the step called for by the circumstances it is a breach of duty not to take it.[44]

An interesting group of cases in a field closely allied to the foregoing concern the duty of the municipality in regard to land contiguous to the highways and not physically differentiated from it. If such ground has been used as the highway to the knowledge of the city it is under a duty to demark the limits of the highway and failing that it is responsible for any defect in the bordering area.[45] An exception to the rule is found where the erection of a fence or other means of demarkation would produce a condition of danger in the highway.[46] Strictly speaking there is no responsibility of duty in connection with the neighboring land. The duty of maintaining the highway is held not to be discharged properly unless the limits of the highway are fixed. The origin of the duty in these cases is the same as in those discussed immediately prior though an additional step of judicial logic is required before it comes into view.

In that class of cases which has become the most numerous—vehicular accidents—the question of duty seldom arises. By statute

[38]Schafer vs. Mayor, 12 App. Div. 384, 42 N. Y. Supp. 744 (1st Dept. 1896).
[39]Porter vs. Village of Attica, 33 Hun 605 (1884).
[40]McVee vs. City of Watertown, 92 Hun 306, 36 N. Y. Supp. 870 (1896).
[41]Hubbell vs. City of Yonkers, 35 Hun 349 (1885).
[42]Grove vs. City of Rochester, 39 Hun 5 (1886).
[43]Lane vs. City of Syracuse, 12 App. Div. 118, 42 N. Y. Supp. 219 (4th Dept. 1896).
[44]Schomer vs. City of Rochester, 15 Abb. N. C. 57 (1884).
[45]Jewhurst vs. City of Syracuse, 108 N. Y. 303, 15 N. E. 409 (1888).
[46]Veeder vs. Village of Little Falls, 100 N. Y. 343, 3 N. E. 306 (1885).

every driver of a vehicle is required to drive carefully so that a duty is owed to all the world. The question does come up where the defendant is a municipal corporation being sued for injuries committed by its firemen while driving the apparatus. Here the duty is overridden for the greater public good and while theoretically it exists, public policy prevents the consequences attendant upon a breach. Another road of reasoning reaching the same end is that the firemen are not agents of the city but its officers engaged on a public duty and the doctrine of *respondeat superior* does not apply to their acts.[47]

The general situation in regard to the plethora of actions which arise from injuries to passengers in public conveyances is very similar to that in vehicular accidents. The question of duty is absent for the reason that the contractual obligation to carry the passenger safely imposes a duty under any theory of origin of duty. The question, if one arises, is rather the existence of the contractual obligation[48] and the law of contracts rather than that of torts is involved for decision. Generally it is beyond the scope of this article to quest deeply into these problems, except where some diversion from the contract rule can be noted. Such an instance is the *ultra vires* operation of a carrier by a municipality. Generally acceptance of the profits of the *ultra vires* transaction vitiates this defense. Acceptance of the fare does not.[49] The reason probably is to be found in the absence of the element of unjust enrichment. A similar contract action is really in quasi-contract. In tort no such avenue of approach for the plaintiff exists.

An unusual duty is put upon keepers of resorts such as bathing beaches and the like to give warning of the presence of danger.[50] This duty is unusual because very few legal consequences flow from absolute negation or inactivity. The strangeness is lessened when it is realized that the duty comes from the contractual duty of the resort owner to his patrons to provide a safe place for them. This restricts the logical horizon to which consequence for inaction might be extended with results which would provide wide scope to the ingenious.

Additional examples of injury cases can be easily found. Such seeking is unnecessary to the purpose of this article. The answer given by the above decisions should tell what the conception of duty is. It remains to put that conception into words. The legal mind

[47]See Smith vs. City of Rochester, 76 N. Y. 506 (1879).

[48]Norton vs. Wiswall, 26 Barb. 618 (1858).

[49]Diluvio vs. City of New York, 73 Misc. 122, 132 N. Y. Supp. 531 (Sup. Ct. 1911).

[50]Augustine vs. Town of Brant, *loc. cit. supra* note 2.

demands a rule, a formula for guidance, but like the prophet in the wilderness there is no sign. We will start from the convenient rule that obligation for injury rests on a basis of contract relationship or statutory requirement. But this does completely limit the law. Nor is the path to the present view along the line of extension of these bases. Granted that examples of such extensions exist in the instances given above, but the way is not that way. The logician in the law has only slightly extended our horizon of obligation. Whether we should say that we have a new and different theory of duty or whether we should recognize certain of the above groups as exceptions to the general rule is perhaps academic and probably unanswerable. As pointed out in those classes of cases a consequent duty is conceived from social relationship—the expectancy of contact with other persons. To translate into terms more familiar to legal utterance, a duty to use care is owed to all persons to whom it is reasonably expectant that injury would result from the failure to use such care. Particularly in the faulty construction and latent defect cases we have adopted such a viewpoint. It has not been made to apply to every case—the tenacious grip of precedent is not that easily loosened. But in those groups it is now the exceptional case which is controlled by the contract-statute rule. A different social conception has discovered injustice in the old rule. An obligation similar to that in nuisance cases was required to meet the needs of the community. And it was promulgated in the characteristic manner of all judicial pronouncement. As far as the sources reveal, that is the conception of duty in our law.